Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

No. _____

PLATO L. SMITH, PETITIONER

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY; JOSEPH E. TAYLOR; JAMES M. THOMAS, JR.; LUTHER C. WILLIAMS; AND LOCAL 689, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR A WRIT

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August 23, 1994

QUESTIONS PRESENTED

1. Whether the Petitioner was denied his constitutional rights by the District Court and U.S. Court of Appeals when they did not give the required full faith and credit to an expungement order issued by the Superior Court of the District of Columbia.

2. Whether Petitioner Smith was deprived of his constitutional right to a jury trial.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The petitioner Plato L. Smith respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia entered in this proceeding on December 21,

1993.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia is not reported and appears in the Appendix hereto. No written opinion was rendered by the United States District Court for the District of Columbia. The District Court's rulings were issued from the bench and are set forth in the transcript that appears in the Appendix.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was filed on December 21, 1993 and a timely petition for rehearing and rehearing en banc was denied on May 25, 1994. This petition for certiorari was filed within 90 days of the denial of the Petition for Rehearing and Rehearing En Banc. This Court's

jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried to jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

This case involves an employment discrimination action by Plato Smith who is seeking damages and reinstatement to his long-term employment with the Washington Metropolitan Area Transit Authority (WMATA). This action is against WMATA and Smith's union, Local 689 of the Amalgamated Transit Union and officials of both WMATA and Local 689. This action was originally filed by Smith in the local court (Superior Court) of the District of Columbia. The case was removed to the U.S. District Court for the District of Columbia by Respondents. Prior to the completion of discovery by Smith, the District Court dismissed and granted summary judgment against Smith in favor of all Respondents. Although Smith had requested a jury trial, the District

Court, while sitting without a jury, made findings of fact, made credibility determinations, weighed the evidence and refused to give full faith and credit to both an expungement statute of the District of Columbia and an Expungement Order of the Superior Court of the District of Columbia before dismissing this action as to all Respondents.

Smith was employed with WMATA as a Bus Operator from June 1970, until he injured his back at work on July 16, 1986. He was off work on worker's compensation from July 1986 until August 1988. On August 21, 1988, Smith returned to work at WMATA on light duty as a Rail Station Attendant. Smith was a member of the Amalgamated Transit Union, National Capitol Local Union 689.

After Smith applied for worker's

compensation benefits, WMATA engaged in continuing acts of retaliation and discrimination against him because of his race and protected activities. On January 21, 1989, Smith was a suspect in an encounter with the criminal justice system. On January 26, 1989, Smith was informed by an agent of WMATA that his long-term employment with WMATA was terminated because of his encounter with the criminal justice system. When Smith sought assistance from Local 689 to be reinstated to his employment with WMATA, Local 689 and its President and Business Agent, Defendant James M. Thomas, Jr., conspired with WMATA and its officials to prevent Smith's reinstatement to employment with WMATA.

When Smith's encounter with the criminal justice system was heard in the

Superior Court of the District of Columbia, it was concluded without any adjudication of guilt against him or any admission of guilt by him. In fact, the Superior Court of the District of Columbia issued an Order of Expungement to Smith concerning his encounter with the criminal justice system. However, WMATA refused to honor that Order of Expungement and refused to reinstate Smith to his employment with WMATA.

Smith filed suit against WMATA and Local 689 in the Superior Court of the District of Columbia on January 24, 1992. This action was removed by Respondents to the United States District Court for the District of Columbia. While the parties were in the process of discovery, Smith, in his deposition, denied having engaged in any criminal activity on January 21,

1989. That exchange is set forth below:

BY MR. TAYLOR:

Q I'm going to ask you whether you sold marijuana on the 21st of January.

A No, I did not.

Q Did you possess or see any marijuana that day?

A Did I possess or see? No, I did not.

Q Did you know that Mr. Ivey had any marijuana?

A No, I did not.

Id. However, prior to Smith's completion of his discovery against Respondents, a Motion for Protective Order and a Motion to Dismiss or for Summary Judgment was filed by Local 689. WMATA, as the institutional Defendant, did not file a dispositive motion.

Local 689's motions came before the U.S. District Court in a July 15, 1992 hearing. At the hearing, the District

Court made an arbitrary finding of fact that the reason Smith "lost his job was because he was distributing a controlled substance while on duty, and that was a sufficient ground, in and of itself, to terminate him and would, in my judgment represent a sufficient ground to deny him reinstatement." Then the District Court proceeded to throw Smith out of court by arbitrarily granting--whether filed or not--motions to dismiss or for summary judgment with prejudice. For example, WMATA had not filed a motion to dismiss or for summary judgment, but the Court dismissed WMATA sua sponte as follows:

> Mr. Heppen: Your Honor, Bruce Heppen on behalf of WMATA and on behalf of the individual--
>
> The Court: Would you come up to the lectern, please.
>
> Mr. Heppen: Certainly, sir. I would like to just point out to the Court that WMATA

> institutionally, as opposed to the individual Defendants Taylor and Williams, does not yet have a motion to dismiss or for summary judgment.
>
> The Court: That's what I understand. I am dismissing sua sponte.
>
> Mr. Heppen: Okay. I just would like to make clear that we didn't have one pending.
>
> The Court: I understand that.
>
> Mr. Heppen: Okay.
>
> The Court: Or you may at this point, if you wish, make an oral motion.
>
> Mr. Heppen: I would like to make an oral motion.
>
> The Court: All right. The motion is granted.
>
> Mr. Heppen: Thank you.

Smith was not allowed to complete discovery or to properly oppose the dismissal of WMATA before his case was arbitrarily dismissed with prejudice by the District Court in favor of Respondents.

REASONS FOR GRANTING THE WRIT

There is an absence of evidentiary support in the record for the District Court's finding that Smith distributed a controlled substance, i.e., marijuana while on duty working for WMATA. Smith has denied possession or distributing marijuana and it was improper as a matter of constitutional law for the District Court to consider the Order of Expungement or the Superior Court proceeding as an admission of guilt by Smith.

The District Court committed constitutional error when it failed to give full faith and credit to the Order of Expungement from the Superior Court of the District of Columbia and to the expungement statute passed by the Council of the District of Columbia and the Congress of the United States.

Because there were material disputes of material facts among the parties, particularly WMATA and Smith, the District Court wrongfully invaded the province of Smith's expected jury and committed constitutional and reversible error by granting summary judgment before the completion of discovery and in disregard of Smith's Rule 56(f) Affidavit. Smith's claims under 42 U.S.C. § 1983 were governed by the three year statute of limitations set forth in D.C. Code § 12-301(8). See, Greenfield v. District of Columbia, 623 F. Supp. 47 (D.D.C. 1985). The District Court deprived Smith of his constitutional right to a trial by jury when it disregarded the Order of Expungement from the Superior Court, improperly weighed the evidence of the case, made prejudicial credibility

determinations and made clearly erroneous fact finding on material issues of facts in dispute.

The Court of Appeals for the District of Columbia Circuit did not accord Petitioner's case the appropriate standard of review nor an opportunity to be heard on appeal as expected. The proper standard of review for the Court of Appeals in reviewing factual determination is "clearly erroneous" as set forth in the Federal Rules of Civil Procedure 52(a). See Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709 (1986). It is well settled in the D.C. Circuit that "a finding is 'clearly erroneous' if it is without substantial evidentiary support or if it was induced by an erroneous application of the law." Case v. Morrisett, 475 F.2d 1300, 1307 (D.C. Cir. 1973) and Cuddy v.

Carmen, 762 F.2d 119, 123 (D.C. Cir. 1985). Moreover, the D.C. Circuit has held that "even if there is some evidence supporting a finding, that finding is clearly erroneous if 'on the entire evidence [the reviewing court] is left with the definite and firm conviction that a mistake has been committed.'" Id. (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)).

Here, there is absolutely no evidentiary support for the District Court's finding that Smith was terminated because he was distributing a controlled substance while on duty. This is the material fact in dispute by the parties and should not have been decided by the District Court as a matter of law. During his deposition, Smith denied possessing or distributing marijuana while on duty. No

admissible evidence was presented to the District Court by Respondents to contradict or refute Smith's testimony. Therefore, it was clearly erroneous and unconstitutional for the District Court to find that Smith had distributed a controlled substance at work. Not even an appearance of justice can be attributed to the unfair manner that Smith was treated by both the District Court and the Court of Appeals below.

1. THE U.S. DISTRICT COURT AND THE U.S. COURT OF APPEALS DENIED PETITIONER HIS CONSTITUTIONAL RIGHTS TO A FAIR JUDICIAL PROCESS WHEN THEY DID NOT GIVE THE REQUIRED FULL FAITH AND CREDIT TO AN EXPUNGEMENT ORDER ISSUED BY THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

a. Standard of Review

When reviewing an issue of law, the

standard of review followed by the D.C. Circuit is de novo. Holtze v. Equitable Life Assurance Society, 548 F.2d 1037, 1042 (D.C. Cir. 1976) and Harbor Insurance Co. v. Omni Construction, Inc., 912 F.2d 1520, 1522 (D.C. Cir. 1990). However, when this case was before the D.C. Circuit, it not only was not given de novo review, but Smith was denied the opportunity to present oral argument in support of his case.

b. Full Faith and Credit

The United States Constitution provides that "Full Faith and Credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." U.S.

Const. Art. IV, § 1. Article IV, § 1 has been extended by statute to include the federal courts as well.[1] Moreover, absent an overriding federal interest,[2] federal courts must give full faith and credit to state courts' orders. Franklin Nat'l Bank v. Krakow, 295 F. Supp. 910, 915 (D.D.C. 1969).[3] Furthermore, the

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[1]See, 28 U.S.C.A. § 1738 (1966) which states as follows: "The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto. . . . Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

[2]See Yacovone v. Bolger, 645 F.2d 1028, 1036 (D.C. Cir. 1981).

[3]Although the District of Columbia is not a state, full faith and credit has been extended to decisions of the courts of the District of Columbia. Washington

Supreme Court has ruled that res judicata (i.e., issue preclusiveness) applies to federal courts on issues originally decided in state court. Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 81 (1984)("[A] federal court must give to a state court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered."). The necessity of a full faith and credit clause is compelling. Otherwise, litigants could go from state to state and from state to federal venues to avoid judgments--thereby prohibiting the judicial system from having a mechanism by which final justice can be achieved.

Gas Light Co. v. Hsu, 478 F.Supp. 1262 (D.Md. 1979). In addition, 28 U.S.C. § 1738 makes the provisions of full faith and credit applicable to "Territories and Possessions" of the United States.

Here, the D.C. Circuit's and the District Court's failure to apply the constitutionally mandated full faith and credit principles to the present case have resulted in a judgment which is contrary to the intent, letter and spirit of a publicly declared law of the District of Columbia. In refusing to give effect to § 33-541(e)(2), the D.C. Circuit and the District Court exercised discretion which it did not have and have wrongfully acted as if they were a super-legislature for the District of Columbia. Furthermore, by using Smith's Order of Expungement as an admission which justifies his termination, the District Court has reinforced the stigma of Smith's prosecution which has been judicially eradicated by the expungement of Smith's record in the Superior Court of the District of

Columbia.

There was absolutely no showing of a federal interest which outweighed the mandatory application of § 33-541(e)(2) to the present case. Without the furtherance of an overriding federal interest, 28 U.S.C.A. § 1738 clearly expresses Congress' intent to have the District Court give full faith and credit to the judgment of the Superior Court of the District of Columbia. Therefore, the actions by the D.C. Circuit and the District Court to the contrary were erroneous and unconstitutional. It should be noted that this case was originally filed in the Superior Court of the District of Columbia and was removed to the District Court by Respondents. Respondents can not--and should not--defeat the legal effect of a state statute

and state court order--the legislature and courts of the District of Columbia--by simply removing to a U.S. District Court.

c. Expungement

To expunge means to physically destroy, erase, obliterate or to strike out wholly. See Blacks Law Dictionary, p. 693 (5th ed. 1979). In pertinent part, D.C. Code § 541(e) states:

> Section 541(e) probation is imposed 'without entering a judgment of conviction.' Upon completion of the probationary period, '[d]ischarge and dismissal under this subsection shall be without court adjudication of guilt, . . . [and] shall not be deemed a conviction for purposes of disqualification or disabilities imposed by law upon conviction of crime . . . or for any other purpose.'(emphasis added).

Twitty v. United States, 541 A.2d 612 (D.C. 1988). The policy behind a Section 541(e) expungement is to permit the court

to "function smoothly and effectively in the designated types of cases, and at the same time it preserves the anonymity of the parties and bars access to the records in such cases (which would disclose their identity) except by court order." O.J.M. v. United States, 554 A.2d 1149, 1151 (D.C. Ct. App. 1989).[4] Furthermore, this court has made it a priority to eliminate the social stigma involved in an arrest record[5] and to give an ex-offender a clean slate as he assimilates back into

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[4]In O.J.M v. United States, 554 A.2d 1149 (D.C. 1989), the appellant was tried in the Superior Court and placed on six months probation without judgment under section 541(e)(1). The appellant appealed, but before the appeal could be heard, the probation expired and the appellant moved that the trial and appeals' courts records be expunged. The court held that the records of the appeal could be expunged in the same manner as juvenile records. See id. at 1150.

[5]See United States v. Dionisio, 410 U.S. 1, 10 (1973).

society.[6] The effect given to the expungement statute in the District of Columbia has been to collect the court papers and place them in a sequestered, non-public file, accessable only to limited persons in limited circumstances. The computerized dockets are revised to prevent identification of the defendant and are only identified by number and the notation "Non-Public Record." See O.J.M., 554 A.2d at 1151. The total impact of the statute is demonstrated by the fact that under section 541(e)(2), once a record has been expunged, that person can testify that the event never occurred without penalty of perjury.[7]

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[6]See Doe v. Webster, 606 F.2d 1226 (D.C. Cir. 1979).

[7]In Twitty v. United States, 541 A.2d 612, 613 (D.C. Ct. App. 1988), the court held that "a witness may not be impeached with a prior guilty verdict, pursuant to

In this case, Smith's arrest and court proceedings concerned an alleged violation of D.C. Code Ann. § 33-541(d);[8] and pursuant to subsections (e)(1) and (e)(2) his records were subsequently discharged and an Order of Expungement was

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D.C. Code [s] 14-305(1981), 'unless and until there is a judgment of conviction premised on a sentence.'. . . [I]n s 541(e) cases where probation is successful, 'entry of judgment . . . will never eventuate.'" Id.

[8]D.C. Code Ann. § 33-541(d) states:

> It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

entered.[9] D.C. Code. Ann. § 33-541(e)(2)

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[9]D.C. Code Ann. § 33-541(e)(1) provides in relevant part:

> . . . If during the period of probation such person does not violate any conditions of the probation, then upon expiration of such period the court shall discharge such person and dismiss the proceedings against him or her. Discharge and dismissal under this subsection shall be without court adjudication of guilt, but a non public record thereof shall be retained solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, such person qualifies under this subsection. Such discharge or dismissal shall not be deemed a conviction for purposes of

> disqualifications or disabilities imposed by law upon conviction of a crime . . . or for any other purpose.

D.C. Code Ann. § 33-541(e)(2) provides in relevant part:

> Upon the dismissal of such person and discharge of the proceedings against him under paragraph (1) of this subsection, such person may apply to the court for an order to expunge from all official records (. . .) all recordation relating to his or her arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this subsection. . . . The effect of such order shall be to restore such person, in the contemplation of this law, to the status he or she occupied before such arrest or indictment or information.

explicitly provides that "[t]he effect of such [expungement] order shall be to restore such person, in the contemplation of this law, to the status he or she occupied *before* such arrest or indictment or information." (emphasis added). In the present case, the language of § 33-541(e)(2) gives instruction as to the effect that expungement of one's criminal record should have. By placing a person in the position he or she occupied before any arrest, the statute would effectively eliminate any findings of wrongdoing on the part of the person whose record has been expunged. Since it is a tenable position to assert that the intent of § 33-541 is to give a person a fresh start, then the District Court's findings and conclusion clearly run contrary to the spirit and language of the statute. The

District Court was clearly erroneous in its finding and should be reversed.

2. SMITH WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL

In this action, Smith had properly demanded a trial by jury pursuant to Rule 38 of the Federal Rules of Civil Procedure. However, the District Court, sitting without a jury, before the completion of discovery and in disregard of Smith's 56(f) Affidavit, unfairly and erroneously decided a factual dispute based on a mistaken view of the evidence presented by Smith. If this error is not corrected, Smith will suffer a denial of his constitutional right to fundamental fairness and to have his case decided by a jury. In Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), the Supreme Court made it clear that "it did not mean

by its holding to authorize 'trial by affidavits.'" Here, the District Court, sitting without a jury, without ever observing Smith testify and in disregard of an Order of Expungement issued by the Superior Court, has improperly weighed the evidence in this case and has unconstitutionally invaded the province of the jury by granting Respondents' motions to dismiss and for summary judgment. Id. ("Credibility determinations, the weighing of the evidence, the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . ."). Id.

Smith maintains that because there were issues of material facts in this case, and evidence from which a jury could reasonably return a verdict in his favor, the D.C. Circuit and the District Court

committed reversible and constitutional error in deciding the factual dispute concerning Respondents' liability. The District Court's error on this point was harmful and deprived Smith of his Constitutional right to trial by jury when it granted WMATA's motion for summary judgment sua sponte. See Rule 38, Fed. R. Civ. P. Equally as wrong, the D.C. Circuit erred when it also sua sponte denied Smith an opportunity to present oral argument in support of his case on appeal. Thus, Smith was not given a full and fair opportunity to file an opposition to the sua sponte motion for summary judgment entered by the District Court nor was Smith given a full and fair opportunity to be heard on appeal.

This above point is significant because the D.C. Circuit is on record as

viewing a summary judgment determination as an issue of law rather than fact and, thus assert that it will consider the matter de novo on review. Beatty v. Washington Metropolitan Area Transit Authority, 860 F.2d 1117, 1119-20 (D.C. Cir. 1988) and Parmac, Inc. v. I.A.M. Nat'l Pension Fund Benefit Plan A, 872 F.2d 1069, 1071 (D.C. Cir. 1989). The standard for granting a motion for summary judgment is set forth in Rule 56(c) of the Federal Rules of Civil Procedure, i.e., it must be shown "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Doe v. United States Dept. of Justice, 753 F.2d 1092, 1095 n.1 (D.C. Cir. 1985). The lower courts erred when it granted Respondents' motion for summary judgment without abiding by the

established standard for granting summary judgment. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505 (1986); Celotex Corp. v. Catrett, 106 S.Ct. 2548 (1986); and Jarrell v. United States Postal Service, 753 F.2d 1088, 1092 (D.C. Cir. 1985). Respondents have failed to carry their burden of showing the absence of a genuine issue as to any material fact. Id. See also, Williams v. Washington Metropolitan Area Transit Authority, 721 F.2d 1412, 1414 (D.C. Cir. 1983) and Abraham v. Graphic Arts International Union, 660 F.2d 811, 184 (D.C. Cir. 1981).

Fairness, not excessive technicality, is the guiding principle under the Federal Rules of Civil Procedure. Gordon v. Nat'l Youth Work

Alliance, 675 F.2d 356, 360 (D.C. Cir. 1982). Accordingly, in order to grant a motion for summary judgment, the Court must find "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). This the District Court has not--and cannot--do. Smith has committed no wrong nor crime that would warrant the termination of his employment. Contrary to the D.C. Circuit's ruling, this point is more than a showing of "some metaphysical doubt as to the material facts" in this case. Cf. Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). There are mega-facts in dispute, i.e., whether Smith was terminated because of his race and protected activitiey and

whether Smith committed a wrong or crime that warratned his termination. In addition, this point is relevant to Smith's full faith and credit challenge to the District Court's action because the District Court did not allow Smith to complete reasonable discovery on the issue of discrimination. The federal courts were not fair in their handling of this matter involving the constitutional rights and expectations of Smith.

Nevertheless, the District Court ruled that there was "no evidence whatsoever of a conspiracy of any description anywhere based upon Mr. Smith's race or based upon the fact of his having filed an application for worker's compensation". As a result, it granted summary judgment on Respondents' behalf; specifically finding there was no credible

evidence to create a genuine issue of fact. This ruling is erroneous, unconstitutional and establishes a dangerous precedent in its application. This is because Smith was not allowed a full and fair opportunity to complete discovery before summary judgment was abruptly granted in Respondents' favor. It also should be noted that Smith filed a Rule 56(f) affidavit with the District Court prior to it granting summary judgment in the Union's favor but it was ignored.

In addition to its finding that there was no evidence of a conspiracy, the District Court ruled that the expiration of the statute of limitations was an additional ground for the dismissal of the complaint. This erroneous District Court ruling was ignored by the D.C. Circuit.

This ruling is erroneous because it is based on Respondents' false assertion that Smith's suit is one for violation of the union's duty of fair representation.[10] Smith has neither alleged nor implied that his claim arises from any violation of the union's duty of fair representation. On the contrary, Smith's claim is grounded upon violations of his rights under 42 U.S.C. § 1983.

In the District of Columbia, § 1983

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[10]Respondents' have asserted that Mr. Smith's cause of action against the Union must be brought within six (6) months of the date it accrues. See, Motion of Defendants Local 689, Amalgamated Transit Union and James M. Thomas, Jr. to Dismiss or for Summary Judgment at 3 (citing Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983)). Petitioner vigorously denied this fact below. Assuming arguendo, that Smith's claim against the Union was barred by a six month statute of limitations, it was clearly erroneous and an abuse of discretion for the District Court to have dismissed WMATA sua sponte.

actions may be brought within three (3) years of the harm giving rise to the cause of action. D.C. Code Ann. § 12-301(8) (1989). The Supreme Court has held that § 1983 actions are governed by the state statutes of limitations for personal injury suits. Wilson v. Garcia, 471 U.S. 261 (1985). The applicable statute of limitations for personal injury in the District of Columbia is contained in D.C. Code Ann. § 12-301(8). See, Greenfield v. District of Columbia, 623 F. Supp. 47 (D.C. 1985); see also, Gordon, 675 F.2d at 358 n.1. Section 12-301(8) provides as follows:

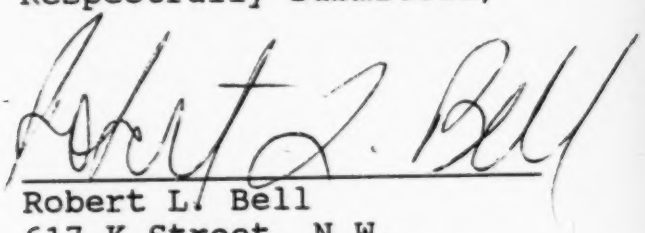
> Except as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified below from the time the right to maintain accrues: . . . (8) for which a limitation is not otherwise specially prescribed--3 years.

Smith's claims in the District Court were filed in the Superior Court of the District of Columbia on January 24, 1992. The events which gave rise to Smith's Complaint below arose when he was wrongfully terminated from his employment with WMATA on January 26, 1989. The Complaint alleging § 1983 violations was brought within three (3) years after the harm giving rise to the cause of action. Therefore, the District Court erred as a matter of law in ruling that the statute of limitations was also applicable as grounds for dismissal of Smith's Complaint against WMATA. It was arbitrary action and unfair for the D. C. Circuit to have ignored this blatant error by the District Court.

CONCLUSION

Based on the foregoing, it is respectfully submitted that a writ of certiorari should be issued to review the judgment and opinions of the District of Columbia Circuit and the District Court.

Respectfully submitted,



Robert L. Bell
617 K Street, N.W.
Washington, D.C. 20001
(202) 842-4066

Counsel for Petitioner
PLATO L. SMITH

A P P E N D I X

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 92-7149 **September Term, 1993**
USDC CV 92-0419

Plato L. Smith,

Appellant

v.

Washington Metropolitan Area Transit Authority, et al.,

Appellee

United States Court of Appeals For the District of Columbia Circuit

FILED MAY 25 1994
RON GARVIN
CLERK

BEFORE: D. H. Ginsburg and Randolph, Circuit Judges and Hubert L. Will*, Senior District Judge

O R D E R

Upon consideration of appellant's petition for rehearing, filed January 4, 1994, it is

ORDERED, by the Court, that the petition is denied.

*of the United States District Court for the Northern District of Illinois, sitting by designation pursuant to 28 U.S.C. § 294(d).

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/ Robert A. Bonner

Robert A. Bonner
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 92-7149 **September Term, 1993**
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Plato L. Smith,

Appellant

v.

Washington Metropolitan Area Transit Authority, et al.,

Appellee

United States Court of Appeals For the Distri of Columbia Circuit

FILED MAY 25 1994
RON GARVIN
CLERK

BEFORE: Mikva, Chief Judge; Wald, Edwards, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges and Hubert L. Will*, Senior District Judge

O R D E R

Appellant's Suggestion For Rehearing In Banc has been circulated to the full Court. No member of the Court requested

*of the United States District Court for the Northern District of Illinois, sitting by designation pursuant to 28 U.S.C. § 294(d).

the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *in banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/ Robert A. Bonner

Robert A. Bonner
Deputy Clerk

United States Court Of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-7149 September Term, 1993
92-cv00419

United States Court of Appeals For the District of Columbia Circuit

Plato Smith,
Appellant

FILED DEC 21 1993
RON GARVIN
CLERK

v.

Washington Metropolitan Area Transit Authority, et. al,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: GINSBURG and RANDOLPH, Circuit Judges, and WILL, Senior District Judge*

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs of counsel. The court is

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*Honorable Hubert L. Will, United States District Court for the Northern District of Illinois, sitting by designation pursuant to 28 U.S.C. § 294(d) (1988).

satisfied, after reviewing the parties' brief, that appropriate disposition of the case does not call for further opinion. See D.C. Cir. R. 14(c).

Smith challenges the district court's summary ruling that Smith had failed to raise a genuine issue of material fact to support his claims of racial discrimination and retaliatory discharge. Our review of the record and of Smith's briefs reveals no evidence that suffices to raise such an issue of material fact. See, *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Crop.*, 475 U.S. 574, 586 (1986) (In response to summary judgment motion nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts"). Smith's full faith and credit challenge to the district judge's ruling

has no relevance to the legal question whether Smith presented evidence of discrimination sufficient to withstand summary judgment. Because Smith failed to do just that, this court need not reach the merits of the district court's alternative ruling that the six-month statute of limitations for a hybrid breach of duty of fair representation/breach of contract claim rendered Smith's complaint untimely. Therefore, it is

ORDERED and ADJUDGED that the ruling from which this appeal has been taken be affirmed.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any untimely petition for rehearing. See D.C. Cir. R. 15(b)(2).

Per Curiam
FOR THE COURT

/s/ Ron Garvin
Ron Garvin, Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-7149 **September Term, 1993**

United States Court of Appeal For the District of Columbia Circuit

Plato Smith,
Appellant

v.

FILED DEC 09 1993
RON GARVIN
CLERK

Washington Metropolitan Area Transit Authority, et al.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: GINSBURG and RANDOLPH, Circuit Judges, and WILL, Senior District Judge*

O R D E R

Upon consideration of the briefs and all of the pleadings and proceedings had herein, and it appearing that the above case falls within the intent and purpose

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*Honorable Hubert L. Will, United States District Court for the Northern District of Illinois, sitting in designation pursuant to 28 U.S.C. § 294(d) (1988).

of Rule 13(i) of the General Rules of this Court and also meets one or more of the criteria set forth in that Rule, it is

ORDERED, by the Court, that the above case presently scheduled for December 13, 1993, will be considered and decided without oral argument.

Per Curiam
For the Court:
RON GARVIN, CLERK

/s/ Cheri Carter

By: Cheri Carter
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PLATO SMITH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 92-419
	)	
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, et al.,	)	FILED JUL 15 1992
	)	
	)	Clerk, U.S. District Court, District of Columbia
Defendants.	)	

ORDER

In accordance with the proceedings in open court at the status conference and motions hearing of July 15, 1992, and the entire record herein, it is, this 15th day of July, 1992,

ORDERED, that this action is dismissed with prejudice.

/s/
Thomas Penfield Jackson
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PLATO L. SMITH, PLAINTIFF,	:	
vs.	:	C.A. NO. 92-419
WMATA, ET AL. DEFENDANT,	:	

WASHINGTON, D.C.
JULY 15, 1992

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE THOMAS P. JACKSON

FOR THE PLAINTIFF: ROBERT BELL, ESQ.

FOR THE DEFENDANT: DOUGLAS TAYLOR, ESQ.
BRUCE HEPPEN, ESQ.

COURT REPORTER: PHYLLIS MERANA
6816 U. S. COURTHOUSE
3RD & CONSTITUTION AVE, N.W.
WASHINGTON, D C. 20001

P-R-O-C-E-E-D-I-N-G-S

THE DEPUTY CLERK: CIVIL ACTION 92-419, SMITH VERSUS WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY.

MR. BELL FOR THE PLAINTIFF.

MR. HEPPEN AND MR. TAYLOR FOR THE DEFENDANT.

THE COURT: ALL RIGHT, GENTLEMEN. I HAVE HAD AN OPPORTUNITY TO REVIEW ALL THE VARIOUS MATTERS THAT ARE PENDING. I BELIEVE THERE ARE SEVEN MOTIONS, ALL OF WHICH ARE RIPE AND IN A POSTURE TO BE RULED UPON.

MR. BELL, DO YOU WISH TO BE HEARD FURTHER ON ANY OF THESE MOTIONS?

MR. BELL: OTHER THAN THE RESPONSES I HAVE ALREADY GIVEN, I WOULD ASK THE COURT, CONCERNING THE MOTION FOR THE DEPOSITION THAT'S SCHEDULED FOR FRIDAY, THAT WE BE

PERMITTED TO GO FORWARD WITH THE DEPOSITION.

THE COURT: ALL RIGHT.

DO THE DEFENDANTS WISH TO BE HEARD FURTHER?

MR. TAYLOR: NO, YOUR HONOR.

THE COURT ALL RIGHT.

MR. TAYLOR: I THINK OUR PLEADINGS ARE ADEQUATE. WE DO NEED GUIDANCE ON THE DEPOSITION, AS MR. BELL INDICATED.

THE COURT: YOU WILL GET IT.

THE PLAINTIFF'S MOTION TO AMEND THE SUPERIOR COURT COMPLAINT IS GRANTED.

DEFENDANT WMATA, TAYLOR AND WILLIAMS' MOTION TO AMEND THE ANSWER IS SIMILARLY GRANTED.

DEFENDANT LOCAL 689 AND THOMAS' SUPPLEMENTARY ANSWER, WHICH I AM TREATING AS A MOTION FOR LEAVE TO AMEND THEIR ANSWER, IS GRANTED.

THE MOTION OF DEFENDANTS TAYLOR AND WILLIAMS TO DISMISS IS GRANTED FOR THE REASONS ADVANCED, NAMELY, SECTION 80 OF THE COMPACT, WHICH PROVIDES THAT EXCLUSIVE LIABILITY FOR COMPLAINTS OF THIS NATURE RESTS WITH THE ENTERPRISE DEFENDANT, WMATA.

NOW, I DO HAVE SOME QUESTIONS I WANT TO ASK YOU, MR. BELL, ABOUT THE MOTION FOR SUMMARY JUDGMENT.

MR. BELL: YES, YOUR HONOR.

THE COURT: AT NO POINT DO I SEE THAT THERE IS ANY DENIAL BY YOUR CLIENT OF THE ACCUSATION THAT ON JANUARY 21ST, 1989, HE WAS, IN FACT, IN POSSESSION OF AND MAKING DISTRIBUTION OF A CONTROLLED SUBSTANCE. DOES HE DENY THAT?

MR. BELL: YES, YOUR HONOR.

THE COURT: WHERE DOES HE DENY IT, IN ALL OF THE PAPERS THAT I HAVE BEFORE ME?

MR. BELL: YOUR HONOR, WE HAVE REPEATEDLY CITED THROUGHOUT THESE PROCEEDINGS THAT THERE WAS AN ORDER OF EXPUNGEMENT ADDRESSING THAT ISSUE.

THE COURT: AN ORDER OF EXPUNGEMENT SIMPLY DEALS WITH HIS CRIMINAL LIABILITY. IT DOES NOT RELIEVE HIM OF HIS RESPONSIBILITY TO HAVE CONFORMED TO THE RULES OF HIS EMPLOYER.

MR. BELL: YOUR HONOR, WITH RESPECT TO THE COURT ORDER THAT WAS ENTERED IN THIS MATTER. IT WAS ENTERED PURSUANT TO D.C. CODE 33-541(E)(2) -- (E)(1) AND (2). I DO HAVE A COPY FOR THE COURT.

THE COURT: TELL ME WHAT IT SAYS.

MR. BELL: IT SPECIFICALLY ADDRESSES THAT AN ORDER OF EXPUNGEMENT RESTORES AN INDIVIDUAL TO THE STATUS THAT HE OCCUPIED BEFORE ARREST OR INDICTMENT AND THAT NO PERSON TO WHOM SUCH ORDER HAS BEEN ENTERED

SHALL BE HELD THEREAFTER UNDER ANY PROVISION OF ANY LAW TO BE GUILTY OF PERJURY OR OTHERWISE GIVING A FALSE STATEMENT BY REASON OR FAILURE TO RECITE OR ACKNOWLEDGE SUCH ARREST, INDICTMENT OR TRIAL IN RESPONSE TO ANY INQUIRY MADE OF HIM OR HER FOR ANY PURPOSE.

THE COURT: NOBODY IS CHARGING HIM WITH PERJURY IN THIS CASE.

MR. BELL: RIGHT. WITH RESPECT TO THIS LITIGATION, YOUR HONOR, HE HAS BEEN RESTORED TO THE STATUS THAT HE OCCUPIED BEFORE THE ARREST.

THE COURT: NOT INSOFAR AS HIS EMPLOYER IS CONCERNED. HE WAS DISTRIBUTING A CONTROLLED SUBSTANCE WHILE ON DUTY.

MR. BELL: YOUR HONOR, IN THE DEPOSITION OF MR. SMITH, HE SPECIFICALLY DENIED THAT ALLEGATION -- IN HIS

DEPOSITION TAKEN UNDER OATH BY THE DEFENDANTS IN THIS MATTER.

THE COURT: I HAVEN'T SEEN IT. IT HASN'T BEEN PRESENTED TO ME. AND I AM GOING TO TREAT THE PLEA OF GUILTY AS THE EQUIVALENT TO AN ADMISSION OF GUILT. AND ON THAT BASIS, I AM GOING TO CONCLUDE THAT THERE IS ABSOLUTELY NO BASIS TO CONCLUDE THAT THE REASON GIVEN FOR HIS DISCHARGE FROM EMPLOYMENT BY WMATA WAS OTHER THAN THAT STATED.

THERE IS FURTHER, IN THIS RECORD NO EVIDENCE WHATSOEVER OF A CONSPIRACY OF ANY DESCRIPTION ANYWHERE BASED UPON MR. SMITH'S RACE OR BASED UPON THE FACT OF HIS HAVING FILED AN APPLICATION FOR WORKERS' COMPENSATION.

THERE ARE ONLY HIS UNSUBSTANTIATED ASSERTIONS OF BELIEF THAT FOR SOME REASON HE WAS TREATED AS HE WAS BECAUSE OF HIS

RACE. IT IS NOT SUBSTANTIATED ANYWHERE IN THIS RECORD, AND I AM NOT GOING TO LET YOU PURSUE THIS CASE FURTHER AT CONSIDERABLE EXPENSE AND CONSIDERABLE INCONVENIENCE TO THESE DEFENDANTS, BASED UPON THE EVIDENCE THAT I HAVE GOT HERE, WHICH SUGGESTS THAT THERE IS NO CONSPIRACY WHATSOEVER THAT YOUR GOING TO BE ABLE TO PROVE, NO MATTER HOW MUCH DISCOVERY YOU TAKE.

MR. BELL: YOUR HONOR, IF I MAY BE HEARD ON THOSE TWO ISSUES. ON THE ISSUE OF THE AFFIDAVIT AND THE DEPOSITION OF MR. SMITH, I DO HAVE THE DEPOSITION WITH ME. I WILL TENDER IT TO THE COURT TO DIRECT THE COURT'S ATTENTION TO THE EXPRESS DENIAL BY MR. SMITH OF SUCH ALLEGATION THAT HE DISTRIBUTED DRUGS ON JANUARY 21ST, 1989.

THE COURT: ALL RIGHT. I WILL ACCEPT YOU ASSERTION. I DON'T FIND IT

SUFFICIENTLY CREDIBLE TO CREATE A GENUINE ISSUE OF FACT HERE, GIVEN THE PLEA OF GUILTY THAT HE ENTERED AND HIS FAILURE TO FILE A GRIEVANCE.

MR. BELL: YOUR HONOR, WITH RESPECT TO THE DOCUMENTS THAT I FILED IN OPPOSITION TO THIS FAILURE TO FILE A GRIEVANCE, I EXPRESSLY SET FORTH AFFIDAVITS FROM INDIVIDUALS IN THE UNION WHO EXPRESSLY INDICATED THAT MR. SMITH DID COME INTO THE UNION HALL, AND MR. SMITH EXPRESSLY STATED IN HIS DEPOSITION, AND IN AFFIDAVITS THAT I HAVE BEEN FILING IN OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT, THAT HE DID DO ALL THAT HE COULD TO FILE A GRIEVANCE WITH THE UNION. THE UNION REFUSED TO ACCEPT THE GRIEVANCE. THE UNION TOLD HIM TO GO THE POLITICAL ROUTE.

THOSE ARE DOCUMENTS THAT ARE IN THE RECORD. THOSE ARE IN AN AFFIDAVIT FROM THE UNION ITSELF, YOUR HONOR, SAYING THAT HE CAME INTO THE UNION OFFICE.

WE HAVE AFFIDAVITS FROM THE UNION PRESIDENT SAYING THAT THOSE THINGS THAT DID NOT OCCUR, AND WE HAVE AN AFFIDAVIT FROM ANOTHER PERSON IN THE UNION SAYING THAT THE PLAINTIFF DID COME IN AS EARLY AS FEBRUARY, 1989. SO THERE IS A DISPUTE.

THE COURT: THERE IS AN AFFIDAVIT IN THE RECORD WHICH SUGGESTS THAT HE DID ASK FOR ADVICE. HE WAS ASKED IF HE SHOULD FILE A GRIEVANCE. HE WAS TOLD, ACCORDING TO MR. JACKSON, THAT HE COULD FILE A GRIEVANCE, BUT IT DIDN'T APPEAR TO MR. JACKSON TO BE THE MORE LIKELY AVENUE BY WHICH HE WOULD OBTAIN THE REINSTATEMENT HE WAS SEEKING, AND SUGGESTED THAT HE PURSUE A POLITICAL ROUTE.

NOBODY TOLD HIM, AS FAR AS I CAN TELL FROM THIS RECORD, THAT HE HAD NO RIGHT TO FILE A GRIEVANCE AND HE CLEARLY DID NOT FILE A GRIEVANCE.

MR. BELL: THAT IS A DISPUTED MATERIAL FACT THAT I THINK GIVES RISE TO A JURY QUESTION.

THE COURT: I DON'T BELIEVE SO.

MR. BELL: IN HIS AFFIDAVIT HE DISPUTES WHAT IS SET FORTH IN THE AFFIDAVIT OF MR. JACKSON, AND IN THE AFFIDAVIT OF THE PLAINTIFF, HE DISPUTES WHAT IS SET FORTH IN THE AFFIDAVIT OF MR. THOMAS.

THOSE ARE DISPUTES OF MATERIAL FACTS. THOSE ARE QUESTIONS THAT GO TO CREDIBILITY. AND THOSE CREDIBILITY DETERMINATIONS, YOUR HONOR, ARE JURY DETERMINATIONS.

WE THINK THIS RECORD, AS IT CURRENTLY STANDS AGAINST THE UNION, DOES SHOW THAT THE UNION HAS GIVEN IN ITS PLEADINGS THUS FAR AND ITS DOCUMENTS AND PAPERS FILED THUS FAR AN INCONSISTENT STATEMENT AS TO WHAT OCCURRED AND MR. SMITH'S EFFORTS TO RETAIN HIS EMPLOYMENT.

THEY SPECIFICALLY TOLD HIM, YOU KNOW, IF YOU LOOK AT THE AFFIDAVIT OF MR. JACKSON, TO GO THE POLITICAL ROUTE FIRST. "WAIT UNTIL AFTER THE CRIMINAL MATTER IS DEALT WITH." HE FOLLOWED WHATEVER WAS TOLD TO HIM WHEN HE WENT IN TO FILE THE GRIEVANCE.

THE QUESTION AS TO WHETHER OR NOT THEY GAVE HIM THE BEST ADVICE AND WHETHER OR NOT THEY ARE SAYING WHAT THEY ARE SAYING NOW IN PRETEXT -- YOUR HONOR, THOSE ARE CREDIBILITY DETERMINATIONS. THOSE ARE JURY QUESTIONS AND THOSE ARE THINGS THAT

WOULD MAKE THIS INAPPLICABLE FOR A DETERMINATION BY SUMMARY JUDGMENT AT THIS POINT IN TIME.

THE COURT: I DON'T FIND THOSE ALLEGATIONS OR CHARACTERIZATIONS OF YOUR CLIENT'S ALLEGATIONS AS BEING SUFFICIENT TO CREATE AN ISSUE OF FACT HERE.

MR. BELL: THAT'S A CREDIBILITY DETERMINATION ON BEHALF OF MY CLIENT?

THE COURT: I DON'T BELIEVE SO. I THINK THE ALLEGATIONS AND THE ASSERTIONS AS TO ALLEGATIONS ARE SO COUCHED AS TO CREATE THE ILLUSION OF AN ISSUE OF FACT WHEN, IN FACT, THERE IS NO ISSUE OF FACT HERE.

MR. BELL: YOUR HONOR, MY CLIENT HAS TESTIFIED UNDER OATH. MY CLIENT'S STATEMENTS AND ASSERTIONS ARE ALL UNDER OATH. WE HAVE FOLLOWED WHAT THE SUPREME COURT SAID ONE MUST DO WHEN YOU ARE

CONFRONTED WITH A SUMMARY JUDGMENT MOTION AND A CREDIBILITY DETERMINATION HAS TO BE MADE.

THE COURT: MR. BELL, YOU CAN TAKE IT UP AND SEE WHETHER OR NOT THE COURT OF APPEALS AGREES THAT YOU HAVE CREATED A GENUINE ISSUE OF MATERIAL FACT HERE.

I WILL STATE, HOWEVER, FOR THE RECORD, FOR PURPOSES OF REVIEW ON APPEAL, THAT THE ADDITIONAL GROUND ASSERTED BY THE UNION AND MR. THOMAS FOR DISMISSAL, NAMELY THE EXPIRATION OF THE STATUTE OF LIMITATIONS, I SIMILARLY FIND MERITORIOUS AND ASSERT THAT AS AN ADDITIONAL GROUND FOR THE DISMISSAL OF THIS COMPLAINT.

AT THIS STAGE, MR. BELL, I AM GOING TO GRANT THE MOTION TO DISMISS THE CASE IN ITS ENTIRETY. AND I AM GOING TO DENY SIMULTANEOUSLY, WITHOUT PREJUDICE, THE DEFENDANT'S UNION AND MR. THOMAS' MOTION

FOR RULE 11 SANCTIONS. AND I WOULD LIKE YOU TO HAVE YOU AND MR. SMITH REFLECT ON WHETHER OR NOT YOU WISH TO PURSUE THIS ACTION.

MR. BELL: YOUR HONOR, MR. SMITH IS ONLY ASKING TO HAVE HIS JOB BACK. MR. SMITH IS NOT PURSUING A FRIVOLOUS ACTION. MR. SMITH IS NOT SAYING ANYTHING IN THIS LITIGATION, YOUR HONOR, THAT HE IS NOT WILLING TO SAY UNDER OATH.

THE COURT: WHETHER OR NOT MR. SMITH IS TO GET HIS JOB BACK I THINK LIES IN THE DISCRETION OF WMATA, BUT I DO FIND AS SUFFICIENTLY ESTABLISHED BY THIS RECORD AND MAKE A FINDING OF FACT TO THE EFFECT THAT THE REASON HE LOST HIS JOB WAS BECAUSE HE WAS DISTRIBUTING A CONTROLLED SUBSTANCE WHILE ON DUTY, AND THAT WAS A SUFFICIENT GROUND, IN AND OF ITSELF, TO TERMINATE HIM AND WOULD, IN MY JUDGMENT,

REPRESENT A SUFFICIENT GROUND TO DENY HIM REINSTATEMENT.

MR. BELL: YOUR HONOR, MAY I ASK THE COURT, IS THE COURT REFUSING TO GIVE FULL FAITH AND CREDIT TO AN ORDER OF THE SUPERIOR COURT THAT HAS ADDRESSED THAT ISSUE AND MAKE THAT ISSUE RES JUDICATA AT THIS POINT IN TIME?

THE COURT: NO, I AM NO REFUSING TO GIVE FULL FAITH AND CREDIT TO AN ORDER OF THE SUPERIOR COURT.

AN ORDER OF EXPUNGEMENT DOES NOT OPERATE TO RELIEVE HIM OF THE CONSEQUENCES OF HIS CRIMINAL CONDUCT INSOFAR AS HIS STATUS AS AN EMPLOYEE OF WMATA IS CONCERNED.

MR. BELL: YOUR HONOR, WE SPECIFICALLY ADDRESSED THAT QUESTION IN EVERYTHING THAT HAS BEEN PUT FORTH BY ALL OF THE DEFENDANTS IN THIS CASE AND WITH

THE TESTIMONY OF MR. SMITH AT HIS DEPOSITION, IN ADDITION TO THE AFFIDAVITS THAT HAVE BEEN SET FORTH. AND WE'RE SPECIFICALLY RELYING UPON THE D.C. STATUTE, WHICH IS THE LAW THAT MYSELF, AS A LAWYER, MUST FOLLOW.

THE COURT: ALL RIGHT. YOU WILL HAVE AN OPPORTUNITY TO PRESENT THAT ARGUMENT TO THE COURT OF APPEALS.

THE MOTIONS TO DISMISS, ALL DEFENDANTS HAVING MADE MOTIONS TO DISMISS OR FOR SUMMARY JUDGMENT, IS GRANTED AND THIS CASE IS DISMISSED WITH PREJUDICE.

MR. BELL: IS THAT AGAINST ALL PARTIES, YOUR HONOR?

THE COURT: THAT'S AS TO ALL PARTIES.

MR. BELL: WMATA AND THE UNION:

THE COURT: I SEE NO EVIDENCE ON THIS RECORD WHATSOEVER TO SUGGEST THAT WMATA IN AND OF ITSELF -- AND THAT WOULD BE THE

ONLY DEFENDANT WHO HAS NOT MOVED TO DISMISS THE CASE -- POSSESSES ANY LIABILITY FOR ANY CONSPIRACY.

MR. HEPPEN: YOUR HONOR, BRUCE HEPPEN ON BEHALF OF WMATA AND ON BEHALF OF THE INDIVIDUAL --

THE COURT: WOULD YOU COME UP TO THE LECTERN, PLEASE.

MR. HEPPEN: CERTAINLY, SIR.

I WOULD LIKE TO JUST POINT OUT TO THE COURT THAT WMATA INSTITUTIONALLY, AS OPPOSED TO THE INDIVIDUAL DEFENDANTS TAYLOR AND WILLIAMS, DOES NOT YET HAVE A MOTION TO DISMISS OR FOR SUMMARY JUDGMENT.

THE COURT: THAT'S WHAT I UNDERSTAND. I AM DISMISSING SUA SPONTE.

MR. HEPPEN: OKAY. I JUST WANTED TO MAKE CLEAR THAT WE DIDN'T HAVE ONE PENDING.

THE COURT: I UNDERSTAND.

MR. HEPPEN: OKAY.

THE COURT. OR YOU MAY AT THIS POINT, IF YOU WISH, MAKE AN ORAL MOTION.

MR. HEPPEN: I WOULD LIKE TO MAKE AN ORAL MOTION.

THE COURT: ALL RIGHT. THE MOTION IS GRANTED.

MR. HEPPEN: THANK YOU.

THE COURT: BUT AS I PREVIOUSLY OBSERVED, AT THIS POINT I AM DENYING, WITHOUT PREJUDICE, THE APPLICATION OF THOSE DEFENDANTS HAVING SOUGHT RULE 11 SANCTIONS IN THE CASE.

MR. TAYLOR: ON THAT POINT, YOUR HONOR, AM I TO UNDERSTAND THAT HE MAY RENEW BEFORE THIS COURT?

WHAT IS YOUR INTENTION WITH REGARD --

THE COURT: I DON'T KNOW WHERE MR. BELL IS GOING TO GO WITH THIS CASE AT THIS STAGE. AT THE MOMENT, I DON'T HAVE ANY

MATTER PENDING BEFORE ME. I HAVE DENIED THAT MOTION. LET'S SEE WHAT OCCURS IN THE FUTURE.

MR. TAYLOR: I UNDERSTAND, YOUR HONOR. THANK YOU.

THE COURT: ALL RIGHT. THANK YOU, COUNSEL.

WE'LL STAND IN RECESS.

(WHEREUPON, THE ABOVE-ENTITLED MATTER WAS ADJOURNED.)

CERTIFICATE OF REPORTER

THIS RECORD IS CERTIFIED BY UNDERSIGNED REPORTER TO BE THE OFFICIAL TRANSCRIPT OF THE PROCEEDINGS INDICATED.

/s/ Phyllis Merana

PHYLLIS MERANA

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

UNITED STATES OF AMERICA

vs. Case No. M 650-89
PDID No. 418253

PLATO L. SMITH

* * * *

ORDER OF EXPUNGEMENT

The Court, having found that the defendant is qualified under D.C. Code 1981, § 33-541(e)(2), for expungement, ORDERS that all official public records in this matter and all records relating to the defendant's arrest, indictment or information, trial, finding of guilt, and discharge from probation and dismissal of proceedings be expunged from all official records to the extent required by District of Columbia Code 1981, § 33-541(e)(2).

October 12, 1989 /s/ Mildred M. Edwards
Date Judge

D.C. Code 1981, § 33-541(e)(2):

(2) Upon the dismissal of such person and discharge of the proceedings against him under paragraph (1) of this subsection, such person may apply to the court for an order to expunge from all official records (other than the nonpublic records to be retained under paragraph (1) of this subsection) all recordation relating to his or her arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this subsection. If the court determines, after hearing, that such person was dismissed and the proceedings against him or her discharged, it shall enter such order. The effect of such order shall be to restore such person, in the contemplation of this law, to the status he or she occupied before such arrest or

indictment or information. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of failure to recite or acknowledge such arrest, or indictment, or trial in response to any inquiry made of him or her for any purpose.

(2)

Supreme Court, U.S.
FILED
SEP 23 1994
OFFICE OF THE CLERK

No. 94-336

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

PLATO L. SMITH,

Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY; JOSEPH E. TAYLOR; JAMES M. THOMAS, JR.; LUTHER C. WILLIAMS; and LOCAL 689,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

ROBERT L. POLK
GENERAL COUNSEL

CAROL O'KEEFFE
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48 pp

BEST AVAILABLE COPY

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the U.S. Court of Appeals correctly ruled that the District of Columbia Superior Court's expungement order was irrelevant to this case and whether the grant of summary judgment constituted a failure to give full faith and credit to the expungement order?

2. Whether the U.S. Court of Appeals correctly ruled that Defendants were entitled to summary judgment under Rule 56?

LISTING OF AFFILIATES PURSUANT TO RULE 29.1

Pursuant to Rule 29.1, Respondent Washington Metropolitan Area Transit Authority does not have a parent corporation, any affiliates or any subsidiaries. The Washington Metropolitan Area Transit Authority is an agency and instrumentality of Maryland, Virginia, and the District of Columbia created by an interstate compact, as authorized by Congress through Pub. L. No. 89-774, to operate a regional transportation system in the Washington, D.C. metropolitan area.

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No. 94-336

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

PLATO L. SMITH,

Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY; JOSEPH E. TAYLOR; JAMES M. THOMAS, JR.; LUTHER C. WILLIAMS; and LOCAL 689,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

Respondent Washington Metropolitan Area Transit Authority ("WMATA") respectfully submits that this case does not present any issue appropriate for consideration by this Court and that the Petition For A Writ of Certiorari should be denied.

COUNTERSTATEMENT OF THE CASE

This case arises from WMATA's termination of its employee, Petitioner Plato Smith ("Smith"), because he sold marijuana on duty, as detailed below.

I. SMITH'S TERMINATION

On January 21, 1989, Smith was on duty as a station manager at the Federal Triangle Metrorail station kiosk. According to the report of WMATA's Transit Police Officer, Smith was observed engaging in the sale of marijuana to a patron from the kiosk. After Smith was arrested by the Transit Police Officer, additional marijuana was discovered in the kiosk. By letter dated January 26, 1989, Smith was informed that he was being terminated immediately because he was "in violation of the . . . [WMATA] rule regarding the sale or possession of drugs or alcohol."

Smith pled guilty to a drug-related charge and was sentenced to unsupervised probation[1] *after* he was terminated by WMATA. By letter dated September 11, 1989, Smith's attorney wrote to WMATA seeking Smith's reinstatement, advising WMATA "that upon completion of his probationary period his conviction . . . will be expunged." Smith was never reinstated.

At all times material to Smith's lawsuit, there existed a collective bargaining agreement between Amalgamated Transit Union Local 689 (of which Smith was a member) and WMATA governing the terms and conditions of employment of represented employees. It includes a

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[1] Thus, Smith was more than "a suspect in an encounter with the criminal justice system" as he asserts in his Petition for Certiorari.

grievance procedure and provides for compulsory, binding arbitration of all unresolved labor disputes. Smith did not file a grievance.

II. WMATA'S POLICY ON DRUGS IN THE WORKPLACE

On November 29, 1984, Local 689 and WMATA executed a Substance Abuse Policy/Employee Assistance Program (SAP/EAP). The SAP/EAP mandates termination of an employee engaged in the sale or possession of controlled substances regardless of whether he has been arrested or convicted of a crime. It is pursuant to this policy that Smith was terminated. Smith's assertion in his Petition at page 6 that he was terminated "*because of* his encounter with the criminal justice system" is simply wrong. (emphasis added). Smith was terminated because he engaged in activities prohibited by WMATA's substance abuse policy.

III. THE PROCEEDINGS BELOW

Smith filed his suit in the District of Columbia Superior Court in January, 1992 against WMATA and Local 689, as well as Joseph Taylor, the management official who had signed the letter dismissing him; Luther Williams, the then manager of Employment Services; and the president of Local 689, James M. Thomas, Jr. On February 18, 1992 WMATA removed the case to the United States District Court For The District Of Columbia.[2] Smith alleged civil rights violations, a conspiracy

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[2]Pursuant to the WMATA Compact, paragraph 81, the United States District Courts have original jurisdiction of all actions brought by or against WMATA, concurrent with the courts of Maryland and Virginia. All actions initiated in a State court are removable to the appropriate United States District Court.

between WMATA and Local 689, retaliatory discharge for having filed a workers' compensation claim, breach of contract, infliction of emotional distress and interference with prospective advantages.[3] On February 24, 1992, the union defendants moved to dismiss or for summary judgment. This motion was denied by the Court without prejudice on April 7, 1992. Smith, WMATA and Local 689 served interrogatories and requests for production of documents on each other, which discovery was answered. On May 26, 1992 Smith and the three named individual defendants were deposed.

On April 21, 1992, defendants Taylor and Williams moved to dismiss, based upon Section 80 of the WMATA Compact. On July 2, 1992, defendants Local 689 and Thomas filed a renewed motion to dismiss or in the alternative for summary judgment.

On July 7, 1992 Smith served a subpoena upon Isidore Gromfine, Esq., Local 689's counsel, who had corresponded with Smith's former attorney during 1990. Local 689 moved to quash the subpoena opposing it because it invaded attorney-client privilege and was unreasonably cumulative or redundant since copies of the correspondence signed by Mr. Gromfine had already been provided. Smith then moved to compel the appearance of Isidore Gromfine at a deposition or in the alternative to hold Gromfine in contempt. On the day the summary judgment motion was heard, this was the only pending discovery matter.[4]

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[3]Smith's Amended Complaint is appended hereto. On Appeal, Smith did not pursue the dismissal of the counts concerning breach of contract, infliction of emotional distress, and interference with prospective advantages.

[4]Thus, Smith's suggestion (Petition at 4) that summary judgment was granted prematurely because substantive relevant discovery was still pending is disingenuous.

In a hearing on July 15, 1992, the District Court granted the motion to dismiss Taylor and Williams, on the basis of Section 80 of the WMATA Compact; the motion to amend the complaint; and summary judgment to Local 689, Thomas, and WMATA. As the Court explained at the hearing, there was no material dispute of fact regarding the stated rationale for Smith's dismissal[5] and there was no evidence in the record of the existence of a conspiracy. Appendix to Petition For A Writ Of Certiorari ("Appx") at 18a. The Court also found that the assertions regarding a racial basis for the action were completely unsubstantiated. The Court stated, "I am not going to let you pursue this case further at considerable expense and considerable inconvenience to the defendants, based upon the evidence that I have got here, which suggests that there is no conspiracy whatsoever that your [sic] going to be able to prove, no matter how much discovery you take." Appx at 19a. Smith filed a timely appeal with the United States Court of Appeals for the District of Columbia Circuit. The Circuit Court, finding that oral argument was unnecessary, affirmed the judgment of the District Court. Smith's petition for rehearing and suggestion for rehearing *in banc* were denied.

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[5]Smith's characterization of this ruling (Petition at 9) as "arbitrary" is specious. The termination letter stating the reason for termination as the violation of the policy was before the Court. There was no *evidence* (other than Smith's "beliefs") of any other reason for the termination.

REASONS FOR DENYING THE WRIT

Petitioner's Writ should be denied because the court below correctly decided the issues; the issues do not involve any novel legal issues or conflict among the circuits warranting this Court's review; and only questions of the sufficiency of evidence are involved.

I.
THE COURTS BELOW CORRECTLY FOUND THAT THE EXPUNGEMENT ORDER WAS IRRELEVANT TO THIS CASE.

Smith argues that because his criminal record was expunged by the District of Columbia Superior Court, the District Court's and Court of Appeals' failure to find that this expungement retroactively eliminated WMATA's grounds for terminating Smith constituted a failure to give the constitutionally required full faith and credit to the expungement. This argument implicates no conflict among the circuits as to the full faith and credit to be given an expungement order, has no implication beyond the facts of this case, and is, very simply, wrong.

A. Full Faith And Credit Of The Expungement Order.

WMATA does not disagree that an order of a state court, including an expungement order of the District of Columbia Superior Court, is entitled to full faith and credit by federal courts. Thus, there is no need for this Court to determine this issue. The real issue here is specific to the facts of this case and, therefore, does not warrant review by this Court. The issue is whether, by not finding that WMATA's termination and refusal to reinstate Smith was unlawful, the lower courts failed to

give full faith and credit in this case. The District Court stated: "No, I am no (sic) refusing to give full faith and credit to an order of the Superior Court. An order of expungement does not operate to relieve him of the consequences of his criminal conduct insofar as his status as an employee of WMATA is concerned." Appx at 27a. The Court of Appeals stated that "Smith's full faith and credit challenge to the district judge's ruling has no relevance to the legal question whether Smith presented evidence of discrimination sufficient to withstand summary judgment." Appx at 6a-7a.

WMATA did not rely upon the fact of an arrest or conviction in dismissing Smith. His employment was terminated because he engaged in conduct which violates the disciplinary rules of the SAP/EAP. The letter terminating Smith explicitly stated that "*setting aside the issue of an arrest and subsequent conviction*, . . . the negotiated . . . policy . . . provides that the use, sale or possession on duty of any intoxicant (drug or alcohol) is grounds for immediate termination. Based upon the Transit Police Officer's observations which are contained in his written reports of the incident, along with the confirming test of the bag's contents, it is my conclusion that you are in violation of the above referenced rule." (emphasis added). Therefore, the subsequent expungement of Smith's arrest record did not affect the circumstances which warranted his removal. Issuance of an expungement order in a criminal proceeding does not change history and does not require recision of Smith's termination nor does it require his reinstatement. In *Dickerson v. New Banner Institute*, 460 U.S. 103, 115 (1983), this Court noted that "expunction does not . . . signify that the defendant was innocent of the crime to which he pleaded guilty."

B. D.C. Code §33-541 Does Not Create a Private Right of Action.

Nothing in D.C. Code Ann. §33-541 suggests that it gives rise to a private right of action against a third party such as WMATA. This Court has cautioned against the creation of a new judicial remedy where a comprehensive statutory scheme, such as that created by Section 66 of the Compact, exists.[6] *Bush v. Lucas,* 462 U.S. 367, 398 (1983). The language of the statute does not suggest that it creates any obligations upon a third party, such as WMATA. The statute provides that a person may apply for an order to expunge from all official records "all recordation relating to his or her arrest, indictment or information, trial, finding of guilty and dismissal and discharge pursuant to this subsection." WMATA's records do not constitute official records as contemplated by this statute, as these records are not available to the public at large. Nor would an expungement order undermine the basis for Smith's dismissal, which was the fact that he engaged in conduct violative of a disciplinary rule. As the District Court stated, "[a]n order of expungment simply deals with [Smith's] criminal liability. It does not relieve him of his responsibility to have conformed to the rules of his employer." Appx at 16a. Thus, there is no basis for alleging that WMATA has "violated" the expungement order.

Expungement restores a person to his status before his arrest and conviction, not to his status before the act committed which resulted in his arrest and conviction.

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[6]The WMATA Compact provides for collective bargaining on virtually any issue arising between labor and management. The Compact mandates compulsory, final and binding arbitration of all labor disputes. *See* §66(c) of the Compact, D.C. Code §1-2431.

Thus, if one goes back in time to the moment before Smith's arrest and conviction, the fact remains that a Transit Police Officer found him engaging in an act which violated WMATA's substance abuse policy and which provided grounds upon which WMATA could lawfully terminate his employment. Whether Smith was or was not arrested and convicted is simply irrelevant. There is no issue concerning full faith and credit for this Court to decide and there is no issue concerning D.C. Code §33-541 which merits this Court's review.

II.
SMITH WAS NOT IMPROPERLY DENIED HIS RIGHT TO A JURY TRIAL.

A. The Circuit Court's Affirmance Was Proper.

Smith argues that the entry of summary judgment denied him his right to a jury trial. Petitioner Smith argues that the Circuit Court not only failed to review the District Court's decision *de novo,* but that it denied (presumably improperly) Smith the opportunity to present oral argument in support of his case. Petition at 16, 28-31. The Circuit Court clearly did review the decision *de novo.* The Court states in its Judgment: "Our review of the record and of Smith's briefs reveals no evidence that suffices to raise such an issue of material fact." Appx at 6a. Accordingly, the issue of what the appropriate standard of review is for an appellate court reviewing the grant of summary judgment is not before this Court.

The Circuit Court's decision to forego oral argument does not warrant this Court's review. Circuit Rule 34 of the rules of the D.C. Circuit (formerly Rule 13(i)) permits the court, by unanimous decision of a three-judge panel, to dispense with oral argument if it decides oral

argument is not necessary. Argument may be waived if: (A) the appeal is frivolous; (B) the dispositive issue or issues have been authoratively decided; or (C) the facts and legal arguments are adequately presented in the briefs, pleadings, and record, and oral argument would not significantly aid the Court. Former Rule 13(i)(3) permits one to move for reconsideration of a decision to dispense with oral argument. Smith did not move to reconsider. This Court ought not be burdened with reviewing an appellate court's completely discretionary decision under its local rules to forego oral argument.

B. Smith Was Not Unconstitutionally Deprived of His Right To A Jury Trial.

A plaintiff in a civil case does not have an absolute right to see his case go to trial and to have the opportunity to testify. The very existence of Federal Rule of Civil Procedure 56 belies this notion. The purpose of Rule 56(b) is to protect defendants from frivolous and vexatious lawsuits and to eliminate them from the court's docket. *See, e.g., Lujan v. National Wildlife Federation,* 497 U.S. 871 (1990) ("purpose of Rule 56 is to enable a party who believes there is no genuine dispute as to a specific fact essential to the other party's case to demand at least one sworn averment of that fact before the lengthy process of litigation continues"); *Matsushita v. Zenith Radio,* 475 U.S. 574 (1986) (purpose of summary judgment is to see whether there is a genuine need for trial). The District Court's grant of summary judgment was proper and well within the bounds of this Court's pronouncements as to when summary judgment may be granted; no further review is required.

Smith states that "the District Court, sitting without a jury, before the completion of discovery and in disregard of Smith's 56(f) Affidavit, unfairly and erroneously decided a factual dispute based on a mistaken view of the evidence presented by Smith." Petition at 28. Smith is wrong on each of these points. First, except for Smith's taking the deposition of the Union's lawyer, Mr. Gromfine, discovery *was* complete. The non-taking of Mr. Gromfine's deposition was inconsequential. The documents that Smith requested Gromfine bring to his deposition had already been produced and the matters on which Smith sought to depose Gromfine were privileged attorney-client communications. Moreover, there was no proffer by Smith that deposing Mr. Gromfine would produce the evidence theretofore lacking which Smith needed to substantiate his claims. This was no more than a minor discovery dispute, clearly undeserving of this Court's attention.

Second, Smith's Rule 56(f) affidavit was insufficient to defeat summary judgment. The proper use of a Rule 56(f) Affidavit is well-settled; there is no circuit conflict on this issue needing the Court's resolution. The purpose of Rule 56(f) is to allow the nonmoving party to postpone a ruling on summary judgment if he can demonstrate that the evidence and facts necessary to defeat summary judgment are not available to him. However, to avail oneself of the protection afforded by Rule 56(f), a party must "conclusively justify his inability to respond adequately or not at all to the movant's affidavits . . . ." *Willmar Poultry Co. v. Morton-Norwich Products, Inc.*, 520 F.2d 289, 294 (8th Cir. 1975). The opposing party "must show to the best of his ability what facts are within the movant's exclusive knowledge or control; what steps have been taken to obtain the desired infor-

mation pursuant to the discovery procedures under the Rules; and that he is desirous of taking advantage of these discovery procedures." *Id.* (quoting 6 J. Moore, *Federal Practice* ¶ 56.24 at 2876 (2d ed. 1974)). Smith did not meet this burden. His rule 56(f) affidavit is replete with conclusory beliefs as to how he believes he was harmed by Defendants[7] and devoid of any concrete facts concerning what additional discovery he wished to take, what information he would gain from further discovery and what his attempts had been to obtain the information. Smith deposed the crucial participants and engaged in written discovery. There is nothing in his affidavit to suggest that there was anything else to learn which he had not yet had the opportunity to discover. *See Ezpeleta v. Sisters of Mercy Health Corp.*, 621 F. Supp. 1262, 1276 (D.C. Ind. 1985) ("[w]hen a party fails to secure discoverable evidence due to his own lack of due diligence, it is not an abuse of discretion for the trial court to refuse to grant a continuance to obtain such information").

Third, the District Court did not *resolve* a factual dispute. Rather, the court, viewing all the evidence before it, determined that there was no factual dispute. The standards for granting and denying summary judgment are well-established by this Court's renowned trilogy and Smith has articulated no reason for this Court to

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[7] *See e.g.* paragraphs 15 and 18 of Smith's first Rule 56(f) affidavit:

> 15. I *believe* that all of the Defendants conspired to terminate my employment because of my race and my protected activity. (emphasis added)
>
> 18. I *believe* that if given a full and fair opportunity to complete discovery, I will be able to present adequate support by affidavit for my opposition to this motion . . . . (emphasis added)

second guess those standards. *Anderson v. Liberty Lobby, Celotex Corp. v. Catrett,* and *Matshshita v. Zenith Radio* address the issue of the non-movant's burden in demonstrating the existence of *evidence* that there is a *sufficient* disagreement of *material* fact to warrant submission to the jury. Smith does not challenge these standards and, thus, there is no question raised by his Petition which this Court need examine.

It is well-settled that a plaintiff cannot survive a motion for summary judgment in the face of dispositive affidavits, without an averment estabishing some dispute of fact. There is no issue for trial "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby,* 477 U.S. 242, 249 (1986). The proper inquiry to determine whether to grant summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251.

Significantly, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment.[8] *Id.* at 247. Only disputes over facts that affect the out-

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[8]Smith's contention that a material dispute exists as to whether he sold marijuana is a red herring. Even if the denial by Smith three years after the incident is sufficient to create a dispute, the dispute is not material. The fact remains that WMATA fired and refused to reinstate Smith because WMATA had grounds, at the time, to believe Smith violated the SAP/EAP. There is no evidence that this reason was pretextual. Smith's attorney, in his September 11, 1989 letter seeking reinstatement for Smith, did not proffer as a basis for Smith's reinstatement that Smith denied having engaged in the conduct; the only basis for reinstatement was the anticipated expungement.

come of the suit will properly preclude the entry of summary judgment. *Id.* at 248. The nonmovant must present affirmative evidence, not mere denials, in order to defeat a properly supported motion for summary judgment. *Id.* at 257. Essentially, when the movant has met its burden under Rule 56, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., Ltd. v. Zanith Radio,* 475 U.S. 574, 586 (1986); *accord Celotex Corp. v. Catrett,* 477 U.S. 317 (1986).

Smith did no more than rely on the conclusory allegations of his Amended Complaint. As the District Court stated, "the allegations and the assertions as to allegations are so couched as to create the illusion of an issue of fact when, in fact, there is no issue of fact here." Appx at 24a. There was no evidence whatsoever of conspiracy of any description anywhere based upon Smith's race or based upon the fact of his having filed an application for workers' compensation.

> There are only his unsubstantiated assertions of belief that for some reason he was treated as he was because of his race. It is not substantiated anywhere in this, record, . . . [T]he evidence that I have got here . . . suggests that there is no conspiracy whatsoever that your (sic) going to be able to prove, no matter how much discovery you take.

Appx 18a-19a. Both the Circuit Court and the District Court came to the same conclusions – Smith was terminated for selling drugs and no evidence existed to support any of Smith's claims.

C. Supreme Court Review Of The Propriety Of A Grant Of Summary Judgment Is Not Warranted.

This Court does not undertake to review concurrent findings of fact. *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949). This Court has previously denied petitions for Writs of Certiorari in cases with issues identical to those raised by Smith, and it is appropriate for the Court to deny Smith's petition as well. *See e.g., Chamness v. F.D.I.C., cert. denied,* 114 S.Ct. 2134 (1994) (No. 93-1573), *summarized,* 62 U.S.L.W. 3741 (may trial court or court of appeals grant or affirm motion for summary judgment *sua sponte,* or on grounds not pleaded in motion?) (May 10, 1994); *Lambert v. Genesee Hospital,* 10 F.3d 46 (2nd Cir. 1993), *cert. denied,* 114 S.Ct. 1612 (1994) (No. 93-1388), *summarized,* 62 U.S.L.W. 3676 (April 12, 1994) (should Court reverse summary judgment dismissal of some of petitioner's employment discrimination claims because court below invaded jury's function of weighing evidence offered, judging credibility, and determining motive?); *Kregos v. Assoc'd Press,* 3 F.3d 656 (2nd Cir. 1993), *cert. denied,* 114 S.Ct. 1056 (1994) (No. 93-863), *summarized,* 62 U.S.L.W. 3476 (Jan. 18, 1994) (did granting summary judgment against petitioner deprive petitioner of his seventh amendment right to a jury trial and did court improperly usurp function of trier of fact by resolving disputed issues of material fact against petitioner and basing conclusions on erroneous facts and unresolved factual issues?); *Rytman v. Kofkoff Egg Farm, cert. denied,* 114 S.Ct. 695 (1994) (No. 93-766), *summarized,* 62 U.S.L.W. 3425 (Dec. 21, 1993) (can federal court acton motion for summary judgment when discovery is outstanding and non-movant has requested oppor-

tunity to conduct discovery before motion is heard?); *Westfall v. Southwest Airlines, cert. denied,* 114 S.Ct. 553 (1993) (No. 93-573), *summarized,* 62 U.S.L.W. 3339 (Nov. 9, 1993) (when ruling on motion for summary judgment, can district court define as facts things that never occurred and are not in record, and can court declare that contradictory affidavits are really in harmony and then decide case on such finding?); *Harris v. American Medical Inc., cert. denied,* 114 S.Ct. 1642 (1994) (No. 92-1721), *summarized,* 62 U.S.L.W. 3036 (July 20, 1993) (has court of appeals sanctioned district court's departure from accepted judicial proceedings so as to call for exercise of Supreme Court's power of supervision, where district court, *inter alia,* granted summary judgment before Plaintiff had completed discovery?)

III.
THERE WERE SUFFICIENT OTHER REASONS SUBSTANTIATING THE COURT'S DISMISSAL OF THE COMPLAINT.

A number of additional bases existed on which the courts below could properly have ruled in WMATA's favor. These arguments support the judgment in WMATA's favor, without regard to the issues raised by Smith's Petition. As a result, this Court would not be likely to reach Smith's arguments if his Petition were granted.

A. The Suit Against WMATA Was Untimely Filed.

The District Court correctly ruled that Smith's suit was untimely. Smith alleged that WMATA wrongfully terminated him and that the Union failed to protest his discharge from employment. Smith was discharged in

January 1989 but he did not file his action until January 24, 1992, three years later. Hybrid wrongful discharge/duty of fair representation suits must be brought within six months of the date of termination. The District Court granted judgment on the basis that the six month limitations had expired. Once Local 689 was dismissed on that basis, WMATA was also properly dismissed, because "the two claims are inextricably interdependent. 'To prevail against either the company or the union, [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union.' " [citation omitted] *Del Costello v. International Brotherhood of Teamsters,* 462 U.S. 151, 164-65 (1983). In *Del Costello,* this Court held that the appropriate limitations period for filing a complaint against the employer is the six month limitation contained in the National Labor Relations Act. *Id.* at 154-55. The majority explicitly rejected establishing different limitations for the employer as opposed to the union. *Id.* at 170, n.19. The instant case is a hybrid suit because it implicates both the Union's duty to represent Smith as well as WMATA's alleged wrongful termination of Smith in breach of his rights.[9] Therefore, applying the six-month statute of limitations to the claims against WMATA as well as Local 689 was appropriate.[10] The facts of this case do not necessitate review

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[9]Section 104(d) of the collective bargaining agreement prohibits discharge except for sufficient cause.

[10]Smith states his suit was not one for breach of fair representation, but the allegations make clear that is precisely the basis of his claim. In *Buscemi v. McDonnell Douglas Corp.,* 736 F.2d 1348, 1351 (9th Cir. 1984), an employee filed suit seeking relief on state law claims of retaliatory discharge, wrongful termin-

[footnote continued]

of the tenets of *Del Costello.*

B. The Failure To Exhaust The Grievance/Arbitration Procedure Required Dismissal Of All The Causes Of Action.

Smith never filed a grievance concerning his discharge or his reinstatement. This failure to exhaust the contractual grievance and arbitration procedures precludes all of the causes of action of Smith's lawsuit. Under §66 of the WMATA Compact, an individual employee wishing to challenge employment decisions must attempt to use the arbitration procedures before seeking a remedy in court. *See Sanders v. WMATA,* 819 F.2d 1151, 1158 (D.C. Cir. 1987); *Hawthorne v. WMATA,* 702 F. Supp. 285 (D.D.C. 1988) (requiring WMATA employees to exhaust the grievance procedure before federal and state claims can be considered.) In *Sanders,* plaintiffs brought an action based upon the United States Constitution and 42 U.S.C. §1983. The claims filed by plaintiffs who had not exhausted the grievance procedure were dismissed. Under *Sanders,* WMATA was properly granted judgment in its favor on all of Smith's counts.

It is well established that Congress, in enacting a particular statute with its own remedial scheme, can foreclose litigation of related claims, including Section 1983 claims, in federal court. *Middlesex County Sewerage Authority v. National Sea Clammers,* 453 U.S. 1 (1981).

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ation of employment, and intentional infliction of emotional distress. Plaintiff insisted that he filed his action under state tort and contract law and not under §301 of the Taft-Hartley Act. The Court held that the complaint was time barred under *Del Costello.* Likewise, *Del Costello* clearly controls the outcome in the instant case.

The language of §66 of the Compact indicates a Congressional intent to make the arbitration procedure as comprehensive as possible and there is no indication that Congress intended that represented employees could choose to avoid this procedure.

This Court has repeatedly held that "statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA." *Gilmer v. Interstate/Johnson Lane,* 500 U.S. 20, 26 (1991). The Court declared that "having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* In *Hirras v. National Passenger Rail Corp.*, 10 F.3d 1142, 1146 (5th Cir. 1994), decided under the Railway Labor Act,[11] the court held that claims of racial discrimination arising under Title VII can be subject to the mandatory provisions of a grievance procedure. The presumption in favor of arbitration is particularly strong in the instant case, where Congress, in enacting the Compact under both its power to enact legislation for the District of Columbia and to create interstate compacts, required the use of labor arbitration.

This Court has recognized the problem of drugs in the workplace and the importance of an employer being able to control that problem. *Nat'l Treasury Employees Union v. Von Raab,* 489 U.S. 656 (1989). WMATA's drug policy is not racist or discriminatory; it simply seeks to prevent WMATA employees from engaging in the use

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[11] Claims involving employees covered by the Railway Labor Act (RLA) are particularly germane since the RLA, like the WMATA Compact, requires arbitration of labor disputes. *See* 45 U.S.C. §153 First (h). The National Labor Relations Act does not require arbitration.

and sale of drugs on duty. If an employee feels he has been wrongfully terminated, he should avail himself of the grievance and arbitration policies and procedures which are in force.

C. Smith Does Not Have Any Cause Of Action Under Any Of The Reconstruction Era Civil Rights Acts.

Smith alleged violations of 42 U.S.C. §§1981, 1983 and 1985. Smith may not proceed under any of these three reconstruction era civil rights statutes. Section 1981 did not cover the conduct which forms the basis of this suit at the time the events occurred; the exclusive remedy for his claims are under Title VII; he cannot establish a §1983 claim; and his claims regarding retaliation for seeking workers' compensation are not redressable under §1985.

1. Smith's claims are not covered by Section 1981.

Section 1981 guarantees that all persons within the jurisdiction of the United States shall have the same right to make and enforce contracts as is enjoyed by white persons. However, Section 1981 does not provide a damage remedy against a public entity. *Jett v. Dallas Independent School District,* 491 U.S. 701, 733 (1989). Thus, Section 1981 is clearly inapplicable to WMATA. Moreover, in 1989, when Smith was terminated and allegedly granted an expungement order, §1981 did not cover any issues relating to termination of an employment contract or to reemployment under an existing contract. Only the initial hiring or a promotion to a position governed by a completely different set of terms of employment (i.e., promotion to a supervisor) was

covered, under *Patterson v. McClean Credit Union*, 491 U.S. 164, 183 (1989).

After *Patterson*, several courts explicitly held that §1981 did not apply to contract termination. *Gersman v. Group Health Ass'n, Inc.*, 931 F.2d 1565 (D.C. Cir. 1991), *vacated and remanded* 112 S.Ct. 960 (1992), *reaff'd* 975 F.2d 886, 899-900 (D.C. Cir. 1992), *cert. denied*, 128 L.Ed.2d 363 (1994). *Accord, Carter v. South Central Bell*, 912 F.2d 832, 839 (5th Cir. 1990) (§1981 does not apply to discriminatory discharge). Although *Patterson* has been supplanted by the Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071, substantive changes to Section 1981 do not apply retroactively to conduct arising before passage of the Act. *Rivers v. Roadway Express Inc.*, 114 S.Ct. 1510 (1994).

2. Smith's claims are not covered by Section 1983.

To establish a claim under §1983, Smith was required to demonstrate that WMATA violated his federally protected rights. The crux of Smith's claim, set forth in his amended Complaint, is that WMATA and Local 689 have a policy of denying African-American males in the District of Columbia an equal opportunity to remain gainfully employed when they have asserted a right to workers' compensation benefits or have had an encounter with the "criminal justice system," and that African-American males are summarily punished with immediate termination without due process. First, the rights Smith asserts under the workers' compensation and expungement laws are *State*-created rights. Because they are not created under the Constitution or federal statute, they are not protected by §1983. *Baker v. McCollan*, 443 U.S. 137 (1979). Second, to the extent Smith alleges a violation of his due process rights, Smith's

claim fails because WMATA has in place a detailed grievance/arbitration procedure of which Smith should have availed himself. *Costello v. Town of Fairfield,* 811 F.2d 782 (2nd Cir. 1987) (no § 1983 claim where there was an adequate post-deprivation remedy through collective bargaining grievance procedure.) Finally, the officers and membership of Local 689 is overwhelmingly comprised of African-American males. It is ludicrous to believe that they harbor a racial animus toward Smith.

3. Smith's claims are not covered by Section 1985.

Smith's action also cannot be maintained under §1985 because: (1) he has not pled the minimum elements of a claim under Section 1985; (2) his exclusive remedy for his claims of discrimination is under Title VII; and (3) claims regarding his application for workers' compensation are not redressable under §1985.

(a) Smith has failed to allege a prima facie case of conspiracy.

Smith's §1985 claims fail because he has not alleged sufficient facts, which if accepted as true, would establish a prima facie case of conspiracy. To state a cause of action for conspiracy, the complaint must allege an agreement to deprive plaintiff of his civil rights predicated on a class based discriminatory animus and must further allege an act in furtherance of the conspiracy. *Bray v. Alexandra Clinic,* 113 S.Ct. 753 (1993). The allegations of a conspiracy under §1985 must be specific and not contain mere conclusory allegations of a conspiracy. *See Robinson v. McCorkle,* 462 F.2d 111, 113 (3rd Cir.), *cert. denied,* 409 U.S. 1042 (1972).

The conspiracy claims were subject to dismissal because Smith did not allege a specific concrete act on the part of anyone to further the alleged conspiracy. Smith does not allege a date when the conspiracy was allegedly formed. Nor has he alleged an agreement between two or more persons to deprive him of a constitutionally protected right. The complaint is fatally defective, as an alleged intra-corporate conspiracy involving WMATA employees is not actionable under §1985(3). *See Zombro v. Baltimore City Police Dept.*, 868 F.2d 1364, 1371 (4th Cir.), *cert. denied*, 493 U.S. 850 (1989) (court dismissed §1985 claim that Police Commissioner conspired with the police department); *Dombrowski v. Dowling*, 459 F.2d 190, 196 (7th Cir. 1972) ("if the challenged conduct is essentially a single act of discrimination by a single business entity, the fact that two or more agents participated in the decision or in the act itself will normally not constitute the conspiracy contemplated by this statute").

(b) Section 1985 may not be used to redress violations of Title VII.

Smith's claims under §1985 also fail since Title VII is his exclusive remedy for his claims of race discrimination. In *Great American Federal Savings and Loan Ass'n v. Novotny*, 442 U.S. 366, 378 (1979), this Court held that "deprivation of a right created by Title VII cannot be the basis for a cause of action under §1985(c)." The Court reached this conclusion because §1985(c) provides no substantive rights. Section 1985 merely provides a remedy for the violation of existing rights. As such, the Court reasoned, a plaintiff should not be permitted to circumvent the administrative and remedial requirements of Title VII by asserting a claim through §1985.

(c) Section 1985 does not cover claims that WMATA retaliated against Smith because he obtained workers' compensation.

Smith alleged in his Amended Complaint that "Defendants took retaliatory actions against Plaintiff in an effort to defeat Plaintiff's right to receive worker's compensation benefits." The entire Amended Complaint (particularly Counts I, II, IV, V and IX) is based upon a claim that Smith suffered worse treatment because he successfully applied for workers' compensation (¶¶30, 32, 41, 45 and 64). On their face, these claims must fail. Employees who have suffered discrimination at the worksite in retaliation for claiming workers' compensation are not protected by §1985.

To state a cause of action under §1985, the defendant's behavior must be motivated by a discriminatory class-based animus. In *United Board of Carpenters v. Scott,* 463 U.S. 825 (1983), the Court held that there exists "no convincing support in the legislative history for the proposition that [§1985(3)] was intended to reach conspiracies motivated by bias toward others on account of their economic views, status or activities." *Id.* at 837. The Court concluded that group actions generally resting on economic motivations should be deemed beyond the reach of §1985(3). *Id.* at 839. Such economic motivation is at the heart of Smith's contentions regarding workers' compensation and therefore all those claims must be dismissed.

CONCLUSION

For the foregoing reasons, Respondent Washington Metropolitan Area Transit Authority respectfully requests this Court to deny Plato Smith's Petition For A Writ Of Certiorari.

Respectfully submitted,

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APPENDIX A

SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA
Civil Division

No. C.A. No. 92-419 (TPJ)

PLATO L. SMITH
2530 Naylor Road, S.E. #102
Washington, D.C. 20020

Plaintiff,

v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY (WMATA)
600 Fifth Street, N.W.
Washington, D.C. 20001

and

JOSEPH E. TAYLOR, individually and in his
official capacity as Superintendent,
Rail Transportation (WMATA)
600 Fifth Street, N.W.
Washington, D.C. 20001

and

JAMES M. THOMAS, JR., individually and in his
official capacity as President-Business Agent,
AMALGAMATED TRANSIT UNION
National Capital Local Union 689
2001 9th Street, N.W., Suite 300
Washington, D.C. 20001

and

LUTHER C. WILLIAMS, individually and in his official capacity as Manager, Direct Personnel Support Office of Personnel and Training (WMATA)
600 Fifth Street, N.W.
Washington, D.C. 20001

Defendants.

AMENDED COMPLAINT

(CIVIL RIGHTS, CONSPIRACY, RETALIATORY DISCHARGE, BREACH OF CONTRACT, INFLICTION OF EMOTIONAL DISTRESS & INTERFERENCE WITH PROSPECTIVE ADVANTAGES)

1. The jurisdiction of this court is invoked pursuant to D.C. Code Sections, 11-921. Plaintiff also is proceeding under 42 U.S.C. 1981 and 42 U.S.C. 1985(3).

2. Plaintiff Plato Smith started his employment with the Washington Metropolitan Area Transit Authority (WMATA) on June 1, 1970.

3. Plaintiff continued his employment with WMATA until he was terminated on January 26, 1989.

DEFENDANTS

4. Defendant Washington Metropolitan Area Transit Authority is a body corporate that was created to, among other things, plan, develop, finance and cause to be operated improved transit facilities, in coordination with transportation and general development planning as part of a balanced regional system of transportation. WMATA has been given the powers and duties to sue and be sued.

5. At all times relevant hereto, Defendant Joseph E. Taylor was employed with WMATA as Superintentent Rail Transportation, WMATA.

6. At all times relevant hereto, Defendant James M. Thomas, Jr., was President-Business Agent for the Amalgamated Transit Union, National Capital Local Union 689. Defendant Amalgamated Transit Union, Local 689, was the collective bargaining representative with WMATA for Plaintiff and other members of Local 689.

7. At all times relevant hereto, Defendant Luther C. Williams was employed with WMATA as Manager, Direct Personnel Support, Office of Personnel and Training, WMATA.

OPERATIVE FACTS

8. Plaintiff is an African American citizen of the United States of America and a resident of the District of Columbia.

9. In exchange for the payment of wages and equal employment opportunity, Plaintiff accepted the position of Bus Operator with Defendant WMATA in June 1, 1970.

10. Plaintiff was employed as a bus operator with WMATA until he injured his back at work when his seat collapsed on July 16, 1986.

11. Plaintiff sustained a work related herniated disc which caused him to be absent from work until August, 1988.

12. Plaintiff returned to light duty work as a rail station attendant on August 21, 1988.

13. Plaintiff's work related back injury left him unable to perform his duties as a bus operator.

14. Plaintiff was a member of the Amalgamated Transit Union, National Capital Local Union 689.

15. All of Plaintiff's performance evaluations were satisfactory or better.

16. Plaintiff applied for and received worker's compensation benefits as a result of his work-related injuries on July 16, 1986.

17. Defendants took retaliatory actions against Plaintiff in an effort to defeat Plaintiff's right to receive worker's compensation benefits and engaged in continuing torts and continuing acts of discrimination against Plaintiff because of his race and protected activities.

18. In January 1989, Plaintiff was a suspect in an encounter with the criminal justice system.

19. Although Plaintiff's encounter with the criminal justice system was concluded without any adjudication of guilt against Plaintiff nor any admission of guilt by Plaintiff, Defendants have used Plaintiff encounter with the criminal justice system as a pretext to terminate his long term employment with WMATA.

20. Defendant Joseph Taylor informed Plaintiff on January 26, 1989 that his employment with WMATA was terminated because of his encounter with the criminal justice system.

21. Defendant James M. Thomas, Jr., and Amalgamate Transit Union, Local Union 689, conspired with Defendants to terminate Plaintiff's employment with WMATA in violation of Plaintiff's contract with Local Union 689 and WMATA.

22. Defendant Luther C. Williams conspired with the other Defendants to terminate Plaintiff's employment with WMATA and to wrongfully prevent Plain-

tiff from being reinstated to his employment with Defendant WMATA.

23. Although Plaintiff was issued an Order of Expungement as a result of his encounter with the criminal justice system, Defendants have continued to retaliate against Plaintiff by refusing to permit him to be reinstated to his employment with WMATA and to obtain the benefits of his contract with WMATA and Local Union 689.

24. Plaintiff is still suffering from the work related injuries he sustained while a bus operator with WMATA.

25. Plaintiff desire to be reinstated to his employment with WMATA without regard to his race, work related injures, or encounter with the criminal justice system.

STATEMENT OF PLAINTIFF'S CLAIMS

Count I
(Civil Rights)

26. Plaintiff realleges and incorporates herein paragraphs 1-25 above as a part hereof.

27. Defendants have intentionally refused to reinstate Plaintiff to his position with Defendant WMATA because of his race.

28. Plaintiff has sought reinstatement of his employment with Defendant WMATA but has been rejected by Defendants.

29. As a direct result of Defendants' wrongful and illegal actions, Plaintiff has been denied his rights to equal employment opportunities and deprived of his employment because of his race.

30. Defendants James Thomas and Amalgamated Transit Union, Local 689, have refused to protect Plaintiff's

constitutional and contract rights in furtherance of their conspiracy with the other Defendants in order to deprive Plaintiff of his employment with WMATA because of his race and retaliation for having sustained work related injuries and sought worker's compensation benefits.

COUNT II
(Retaliatory Discharge)

31. Plaintiff realleges and incorporates herein paragraphs 1-30 above as a part hereof.

32. Defendants have engaged in the aforesaid acts of employment discrimination and retaliation against Plaintiff because Plaintiff was injured at work and has claimed worker's compensation benefits from Defendant WMATA.

33. As a direct result of Defendants' illegal actions, Plaintiff has been harmed and deprived of his employment with Defendant WMATA.

34. Plaintiff realleges and incorporates herein paragraphs 35-81 below as a part hereof.

COUNT III
(Intentional Infliction of Emotional Distress)

35. Plaintiff realleges and incorporates herein paragraphs 1-34 above as a part hereof.

36. Defendants' willful, intentional, outrageous and malicious conduct have been directed against Plaintiff in order to cause Plaintiff to suffer emotional and mental distress.

37. As a direct result of Defendants' wrongful conduct as set forth herein, Plaintiff has suffered and continue to suffer emotional distress.

38. Plaintiff realleges and incorporates herein paragraphs 39-81 below as a part hereof.

COUNT IV
(Interference with Prospective Advantages)

39. Plaintiff realleges and incorporates herein paragraphs 1-38 above as a part hereof.

40. Defendants have intentionally interfered with Plaintiff's rights to equal employment opportunity to continue his employment and advance to higher level positions with Defendant WMATA or to seek a normal retirement from WMATA.

41. Defendants continuing discrimination and the retaliation which Plaintiff is apparently experiencing in his wrongful denial of employment with Defendants have deprived Plaintiff of comparable pay and employment benefits which are enjoyed by the white employees at Defendant WMATA and those employees who have not claimed worker's compensation benefits. Plaintiff has been harmed as a direct result of Defendants' wrongful and tortious interference with Plaintiff's prospective advantages.

42. Plaintiff realleges and incorporates herein paragraphs 43-81 below as a part hereof.

COUNT V
(Conspiracy)

43. Plaintiff realleges and incorporates herein paragraphs 1-42 above as a part hereof.

44. Prior to and in 1989, the Defendants were engaged in a conspiracy to deny Plaintiff his rights to equal employment opportunity, including his rights to return

to his position and to advance and retire as an employee of Defendant WMATA.

45. In furtherance of said conspiracy, the Defendants made false and baseless accusations about Plaintiff and wrongfully misrepresented their employment policy in order to terminate Plaintiff and to deprive him of other employment opportunities which have been granted to similarly situated white employees and employees who have not sought worker's compensation benefits.

46. Such conduct on the part of the Defendants was malicious, willful, wanton, and in knowing, intentional, and reckless disregard of the rights of the Plaintiff and other black and injured employees at Defendant WMATA.

47. Defendants had knowledge of the wrongs complained of herein by Plaintiff and have failed to prevent or aid in preventing any wrongs to Plaintiff complained of herein.

48. As a result of such conduct on the part of the Defendants, the Plaintiff has suffered severe and serious injuries, as aforesaid.

49. Plaintiff realleges and incorporates herein paragraphs 50-81 below as a part hereof.

COUNT VI
(Breach of Contract)

50. Plaintiff realleges and incorporates herein paragraphs 1-49 above as a part hereof.

51. Defendants have consistently, knowingly and intentionally, breached the provision of Plaintiff's contract of employment by failing to and refusing to allow Plaintiff to return to his employment with WMATA.

52. As a direct result of Defendants' failure to honor the order of Expungement entered by this Court and the failure to grant the reinstatement of Plaintiff after his wrongful termination, Plaintiff has been denied a full and fair opportunity to continue his employment and occupy available positions with Defendant WMATA or to seek a normal retirement.

COUNT VII
(Expungement)

53. Plaintiff realleges and incorporates herein paragraphs 1-52 above as a part hereof.

54. Defendants have failed to honor the October 12, 1989 Order of Expungement issued by this Court expunging all records of Plaintiff's encounter with the criminal justice system on January 21, 1989.

55. Plaintiff seeks a declaratory judgment and injunction from this court requiring Defendants to honor this Court's October 12, 1989 Order of Expungement of Plaintiff's encounter with the criminal justice system.

COUNT VIII
(Constitutional Claims)

56. Defendants terminated Plaintiff for his encounter with the criminal justice system. Defendants asserted reason for terminating Plaintiff was not only false but malicious and asserted in wanton and deliberate indifference to Plaintiff's constitutionally protected rights to his good name, reputation, honor and integrity and in deliberate indifference to Plaintiff's constitutionally protected freedom to take advantage of other employment opportunities.

57. The manner in which Plaintiff was terminated from his employment deprived Plaintiff of both his liberty interests to his good name and reputation and his freedom to take advantage of other employment opportunities for which he is qualified.

58. Plaintiff's termination was accompanied by public dissemination of the reason for his dismissal, i.e., contact with the criminal justice system, this reason stigmatizes Plaintiff's reputation as a free and equal citizen of the United States and forecloses prospective advantages, including, future and continuing employment opportunities without due process of law.

59. Plaintiff was given no notice of his wrongful termination, no opportunity to be heard or to be cleared of the false charge which was wrongfully used to terminate his employment and to have him falsely arrested. Plaintiff was denied the right to be heard before he was terminated.

60. Plaintiff was wrongfully deprived of his constitutional right to be a presumption innocent after his encounter with the criminal justice system.

61. Fundamental fairness and due process required that Plaintiff be provided a hearing at which he would have had the opportunity to challenge the truthfulness of the ground which were were proffered for his separation from his long term employment with WMATA.

COUNT IX
(42 U.S.C. 1983)

62. Plaintiff realleges and incorporates the allegations set forth in paragraphs 1 to 61 above as if fully set forth herein.

63. The acts described in paragraphs 1 to 61 above constitute malicious, arbitrary and capricious action by Defendants against Plaintiff in violation of the First and Fifth Amendments to the Constitution of the United States.

64. The actions of Defendants WMATA, Taylor and Williams resulted from and were taken pursuant to a de facto policy of WMATA, and implemented by officials and employees of WMATA such as Defendants, to deny African-American males in the District of Columbia an equal opportunity to remain gainfully employed when they have asserted a right to worker's compensation benefits or have had an encounter with the criminal justice system.

65. The aforesaid de facto policy of discriminating against African-American males such as Plaintiff is further implemented by Defendants by summarily punishing persons such as Plaintiff with immediate termination of this employment without due process of law.

66. The existence of the aforesaid de facto policy of discriminating against African-American males such as Plaintiff has been known to supervisory and final policy making officials of WMATA for a substantial period of time.

67. Despite Defendants' knowledge of the aforesaid de facto policy, Defendants have failed to accord African-American males such as Plaintiff, who have had an encounter with the criminal justice system, an equal opportunity to maintain gainful employment.

68. Defendants, including WMATA, have caused Plaintiff's statutory and constitutional rights to be intentionally violated.

69. As a result of the acts described herein, Plaintiff has suffered severe anxiety, emotional distress and has been wrongfully deprived of his employment.

70. All of Defendants' actions described above in depriving Plaintiff of his employment have been taken under color of law and in violation of Plaintiff's statutory and constitutional rights.

71. Defendant WMATA has entered into an agreement with Local 689 whereby African-American males such as Plaintiff can be wrongfully deprived of their employment under color of law.

72. Defendant WMATA has intentionally and willfully misplaced Plaintiff's official personnel files in further implementation of its de facto policy of depriving African-American males such as Plaintiff of gainful employment.

73. Defendant WMATA while acting under color of law have failed to explain to Plaintiff how his official personnel files were misplaced.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays for the Court to:

74. Enter a declaratory judgment that the acts and practices of Defendants complained of herein are in violation of the public policies and the laws of the District of Columbia and the United States of America.

75. Grant Plaintiff a permanent injunction restraining the Defendants, their agents, assistants, successors, employees, attorneys, assigns and all those acting in concert or cooperation with them or their direction from further engaging in the acts and practices which

discriminate against Plaintiff because of his race and protected activities.

76. Issue an order requiring immediate installation of Plaintiff to the position to which he is qualified and occupied or would have applied and occupied with all rights and privileges due to him, including damages (compensatory and punitive damages), back pay, promotions and other employment benefits which Plaintiff would have received but for the unlawful conduct of the Defendants; and

77. Grant Plaintiff the costs of this action, including reasonable attorney's fees and expenses; and

78. Grant Plaintiff an amount in compensatory damages to be proved at trial; and

79. Grant Plaintiff punitive damages against Defendants' jointly and severally, in the amount of One Million ($1,000,000.00) Dollars; and

80. Issue an order to enforce the October 12, 1989 Order of Expungement from the Superior by requiring Defendants to expunge Plaintiff's encounter with the criminal justice system from their records and to reinstate Plaintiff to his employment with WMATA; and

81. Grant Plaintiff such other and further relief that this Court may deem just and proper.

Respectfully submitted,

Robert L. Bell, #954156
617 K Street, N.W.
Washington, D.C. 20001
(202) 842-4066

Attorney for Plaintiff,
PLATO L. SMITH

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues herein.

Robert L. Bell